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W. S. FORBES & CO. *v.* SOUTHERN COTTON OIL CO.

June 16, 1921.

[108 S. E. 15.]

1. Appeal and Error (§ 843 (4)*)—Propriety of Sustaining Demurrer to Original Declarations Not Reviewable, Question Being Moot.—Where plaintiff under Code 1919, § 6116, excepted to the sustaining of demurrers to the original declaration, the matters will not be reviewed, the question being moot as plaintiff filed an amended declaration and did not stand on the original.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 430.]

2. Sales (§ 81 (1)*)—Time Held of Essence of Contract.—Where a sale contract fixes a particular time for the delivery of cotton seed oil, the price of which is fluctuating, time is considered of the essence of the contract, and failure to perform within the time limited ordinarily constitutes a breach.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 421.]

3. Evidence (§ 129 (6)*)—Evidence that in Previous Contract the Seller Waived Strict Performance Inadmissible.—Where a contract required the buyer of cotton seed oil to furnish cars within stipulated time, evidence that in case of a previous contract the seller waived delay is not admissible; it not appearing that there was an increase in the market price, as in case of the latter contract.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 302.]

4. Trial (§ 59 (2)*)—The Order of Examination of Witnesses Rests Chiefly in Discretion of Trial Court.—The order of the examination of witnesses rests chiefly in the discretion of the trial court.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 597.]

5. Appeal and Error (§ 1058 (2)*)—Refusal to Permit Witness to Answer Question Not Error, Where Question Is Subsequently Allowed.—Where the same question was later allowed, the action of the trial court in first refusing to permit the witness to answer question not error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 659.]

6. Customs and Usages (§ 17*)—Where Contract Expressly Fixed Time for Performance, It Cannot Be Varied by Custom.—Where a contract for the sale of cotton seed oil expressly fixed the time for performance, it cannot be varied by an alleged custom of the seller that in event of the buyer's failure to furnish cars within the time limited, the delay would be waived.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 412.]

7. Jury (§ 11 (5)*)—Provisions of Federal Constitution as to Jury Trial Do Not Apply to State.—Const. U. S. Amend. 7, declaring that in suits at common law where the value in controversy shall ex-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ceed \$20, the right of trial by jury shall be preserved, does not apply to state courts, but is applicable only to the federal court.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 10.]

8. Jury (§ 9*)—Jury Trial Cannot Be Taken Away by Implication.—The right to jury trial cannot be taken away by implication.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 9.]

9. Constitutional Law (§ 48*)—Statute Should Not Be Declared Unconstitutional unless Plainly So.—A statute should not be declared unconstitutional, unless so plainly unconstitutional as to leave no doubt.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 152.]

10. Jury (§ 13 (3)*)—Constitutional Guaranty of Jury Trial in Suit between Man and Man Does Not Apply to Chancery Cases.—While Const. 1902, § 11, declares that in controversies respecting property and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred, jury trial is not proper in a chancery case; the word "suit" as used in the section being used in the same sense as the word "controversies," and not including chancery proceedings.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 11.]

11. Trial (§ 176*)—By Demurrer to Evidence the Whole Case Is Taken Away from the Jury.—By demurrer to the evidence, which is a well-established practice, the whole case is taken away from the jury, and referred to the court for decision.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 514.]

12. New Trial (§ 164*)—On Setting Aside Verdict, Trial Court Is Not Bound to Grant Judgment to Unsuccessful Party.—Under Code 1919, § 6251, declaring that when the verdict of a jury in a civil action is set aside by the trial court on the ground that it is contrary to the evidence or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case, the trial court, on setting aside a verdict of the jury, is not required to render judgment for the party against whom verdict was rendered.

13. Jury (§ 34 (3)*)—Provision, that on Setting Aside Verdict for Insufficiency of Evidence Trial Court Shall Decide the Cause, Not a Denial of Jury Trial.—While Const. 1902, § 11, declares that in all controversies respecting property and in suits between man and man trial by jury is preferable and ought to be held sacred, yet in view of the practice of demurring to the evidence, and of the fact that, unless evidence raising the controversy is presented, there is no scope for the jury's function, Code 1919, § 6251, declaring that, when the verdict of a jury in a civil action is set aside by the trial court upon the ground that it is contrary to the evidence, etc., a new trial shall

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not be granted if there is sufficient evidence for the court to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper, does not work a denial of the right to jury trial.

14. Statutes (§ 225*)—If Two Statutes Can Stand Together, They Should Be So Construed.—If two statutes can stand together they should be so construed.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 766.]

15. New Trial (§ 164*)—Provision that in Event Verdict Is Set Aside as Unsupported by Evidence Trial Court Shall Render Judgment Does Not Conflict with Provision Forbidding Peremptory Instructions.—Code 1919, § 6003, forbidding peremptory instructions directing verdict, is not in conflict with section 6251, declaring that, if verdict be set aside as contrary to the evidence, etc., the trial court shall render judgment, for the first section is intended to prevent errors by the court in the heat of trial, while the latter allows the court to act after deliberation.

16. Appeal and Error (§ 882 (17)*)—Party Cannot Complain of Finding in Accordance with Its View.—Where defendant insisted that the contract was made with reference to the rules of an association, and an instruction on that issue was given at its instance, it cannot complain of a finding in accordance with that view.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 608.]

17. Sales (§ 181 (1)*)—Buyer Has the Burden of Showing that He Furnished Tank Cars within the Time Limited.—Where the contract for sale of cotton seed oil required the buyer to furnish tank cars within time limited, the buyer, on suing for breach, has the burden of showing that he furnished the cars within the time limited.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 343.]

18. Sales (§ 181 (11)*)—Evidence Insufficient to Show that Buyer of Cotton Seed Oil Delivered Tanks to the Seller within Time.—Where a contract for the sale of cotton seed oil required buyer to furnish tanks within the time limited, evidence held, in an action by the buyer for the seller's breach, insufficient to show that the buyer furnished tanks within time.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 322.]

Appeal from Circuit Court of City of Richmond.

Assumpsit by W. S. Forbes & Co. against the Southern Cotton Oil Company. A verdict for plaintiff was set aside, and judgment entered for defendant, and plaintiff appeals. Affirmed.

S. S. P. Patterson, of Richmond, for appellant.

Coke & Pickrell and *R. W. Carrington*, all of Richmond, for appellee.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.